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## AFTER "VOLUNTARY" LIABILITY: THE EPA'S IMPLEMENTATION OF SUPERFUND

*Carol L. Dorge\**

### I. INTRODUCTION

Although the 1970s were known as the environmental decade, one of the most significant environmental statutes was not adopted until 1980. That statute, the Comprehensive Environmental Response Compensation and Liability Act of 1980 (CERCLA),<sup>1</sup> commonly known as Superfund,<sup>2</sup> like the Resource Conservation and Recovery Act (RCRA)<sup>3</sup> before it, was designed to fill a void in existing federal environmental regulation.<sup>4</sup>

CERCLA's principal focus is on landfill sites which have served in the past for the disposal of hazardous waste.<sup>5</sup> Section 104 of the Act authorizes government cleanup of hazardous sites. This authority is supplemented by "abatement authority" in section 106, which allows the government to take emergency action to clean up or control a threatening hazardous waste site. Section 106 allows the EPA to bring an injunctive action against a potentially liable party where an imminent and substantial endangerment is threatened. Section 107 creates a scheme of liability permitting recovery of the government's cost of controlling contaminants which may be released from these inactive sites and from existing

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1. 42 U.S.C. §§ 9601-9657 (Supp. V 1981).

2. *See, e.g.*, 126 CONG. REC. H9165 (daily ed. Sept. 19, 1980) (statement of Rep. Biagi).

3. 42 U.S.C. §§ 6901-6986 (Supp. V. 1981).

4. *See, e.g.*, 126 CONG. REC. H9156 (daily ed. Sept. 19, 1980) (statement of Rep. Staggers).

5. *See, e.g.*, 126 CONG. REC. H9154-55 (daily ed. Sept. 19, 1980) (statement of Rep. Florio).

manufacturing facilities. This section establishes rules of liability for site owners as well as various customers of the disposal sites, such as manufacturers who generate waste by-products.<sup>6</sup> Strict liability, defined as the standard of liability under section 311 of the Clean Water Act, is imposed.<sup>7</sup> Cleanup costs will exceed ten million dollars at many sites.<sup>8</sup> The fund has accumulated over 650 million dollars, much more money than has been spent.<sup>9</sup>

Despite the significant scope of the statute, it is the result of Congressional compromise, and represents a retreat from earlier versions of the bill which proposed more expansive and less defined liability schemes.<sup>10</sup> Congressional compromise resulted in statutory confusion, and courts are now in the process of attempting to determine Congress' intent with regard to many CERCLA provisions.

Even taking into account this statutory confusion, implementation of CERCLA has floundered under the Reagan Administration. Despite the substantial support which the Act received from the Senate Republican leadership,<sup>11</sup> the Administration's im-

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6. See 42 U.S.C. § 9607 (Supp. V 1981). Specifically, in addition to *owners and operators*, persons who *dispose of waste at a site* (generators) and persons who *transport waste to a site* are among those who may be held liable. 42 U.S.C. § 9607a-1-9607a-4 (Supp. V 1981). A liable party may be held responsible for damage to natural resources as well as cleanup costs. 42 U.S.C. § 9607(a)(4)(c) (Supp. V 1981). Regulations for assessing those damages are to be promulgated. 42 U.S.C. § 9651(c) (Supp. V 1981). A notice of proposed rulemaking has been published at 48 Fed. Reg. 1084 (1983), and 48 Fed. Reg. 34,768 (1983) (to be codified at 40 C.F.R. ch. II).

7. See 42 U.S.C. § 9601(32) (Supp. V 1981); 33 U.S.C. § 1321 (Supp. V 1981).

8. The EPA has estimated that surface cleanup costs will be approximately \$4.5 to \$6 million per site, and an additional \$4 to \$5 million for groundwater cleanup. 14 ENV'T REP. (BNA) 1245 (Nov. 4, 1983). Earlier estimates set the average cost at only \$6.5 million. *Id.*; 48 Fed. Reg. 40,677 (1983).

9. The fund is structured as a "1.6 billion dollar fund," supported by Congressional appropriations through 1985. *Id.*; 42 U.S.C. § 9653 (Supp. V 1981). The EPA announced in September, 1983, that the fund had accumulated \$668.5 million as of July 1, 1983. Of that amount, \$184.4 million had been paid out. 14 ENV'T REP. (BNA) 803 (Sept. 9, 1983). A later announcement suggests that a significant proportion of the money which has been spent (\$47 million "obligated" as of Sept. 30, 1983) has been used in "emergency" cleanup actions. Chi. Trib., Nov. 15, 1983, § 1, at 8, col. 1. The EPA estimates that as much as \$16 billion may be required to cleanup remaining sites—ten times more than the present authorization. 14 ENV'T REP. (BNA) 725 (Feb. 3, 1984).

10. The enacted bill resulted from three years of Congressional hearings, debates, and compromise on bills reported to the floor of each house of Congress. Most of the principal features of the act were debated and contested, including funding mechanisms, the need for federal legislation, and most significantly, the appropriate standard of liability. See *infra* text and notes at notes 50-60.

11. *E.g.*, 126 CONG. REC. 14,988 (1980). A bipartisan group of 78 Senators voted in favor of the bill. Only nine Senators opposed the measure. *Id.*

plementation of the new program has indicated an unwillingness to put into effect the comprehensive scheme approved by Congress. The Administration has clearly declared its intention to encourage "voluntary" private-party cleanup, using its emergency response authority under section 106 of the Act, rather than clean up the site itself under its section 104 authority, and then seek cost recovery from responsible parties under section 107. The strategy appears to be to coerce private parties to accept some degree of financial responsibility for cleanup, rather than defending themselves in a later cost recovery action under section 107.<sup>12</sup> "Potentially responsible parties" have been identified and offered the alternative of paying for the cleanup of a site, or litigating the question of liability.<sup>13</sup> The threat of a judicial determination of liability is onerous because responsible parties are apparently jointly and severally liable,<sup>14</sup> and some sites were cleaned up under these negotiated settlements.<sup>15</sup>

Both Democratic and Republican leaders have harshly criticized the Reagan Administration for its failure to spend the monies authorized by statute for the cleanup of hazardous sites,<sup>16</sup> and for its handling of the hazardous waste program in general.<sup>17</sup>

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12. 12 ENV'T REP. (BNA) 613-14 (Sept. 18, 1981). Even the National Contingency Plan embodies the "voluntary" cleanup concept as an alternative to remedial response action. 47 Fed. Reg. 31,216 (July 16, 1983) (to be codified at 40 C.F.R. § 300.68(c)); *see infra* text and notes at notes 125-26; *see generally* 47 Fed. Reg. 31,180-31,243 (to be codified at 40 C.F.R. § 300).

13. *See, e.g.*, Brown, *EPA Pre-litigation Enforcement Strategy in Hazardous Waste Cases*, 14 ENV'T REP. (BNA) 149-52 (May 27, 1983).

14. A common scenario involves a site where generators have contributed different quantities of waste and waste with different hazard potential. The EPA has taken the position that parties are jointly and severally liable, and the issue has been the subject of heated dispute. The Southern District of Ohio recently sided with EPA in *United States v. Chem-Dyne Corp.*, No. C-1-82-840, slip op. (S.D. Ohio, Oct. 11, 1983). The court held that, at least where the harm is indivisible, parties may be jointly and severally liable. *Id.* at 16. This involves, however, a "fairly complex factual determination" of whether the harm is indivisible. *Id.* at 18. Discussing the legislative history of the liability provision, the court reasoned that by removing a reference to joint and several liability from the bills' liability provision, Congress apparently intended that common law or statutory rules relating to joint and several liability continue to apply. *Id.* at 11; *see* 126 CONG. REC. H11,787 (daily ed. Dec. 3, 1980) (statement of Rep. Florio); *id.* at H11,788 (statements of G. Bursky, United States Dept. of Justice).

15. For example, more than 200 generators participated in settlement agreements totaling more than \$10 million for cleanup of the Seymour site in Indiana. 13 ENV'T REP. (BNA) 877 (Oct. 29, 1982); *id.* at 1412 (Dec. 17, 1982). A settlement agreement between Velsicol Chemical Company, the EPA, and the State of Michigan resulted in a cleanup fund of \$38.5 million. *Id.* at 1165 (Nov. 26, 1982).

16. *See, e.g.*, 12 ENV'T REP. (BNA) 1742-43 (April 30, 1982).

17. *See, e.g.*, 13 ENV'T REP. (BNA) 921-923 (Nov. 5, 1982).

As its first order of business, the new Administration reduced the size of the EPA and restructured its enforcement and hazardous waste programs. Reorganization took precedence over regulatory action,<sup>18</sup> and the EPA delayed until July 16, 1982, a major step required by CERCLA—amendment of the National Contingency Plan.<sup>19</sup> The newly titled “National Oil and Hazardous Substances Contingency Plan” contains important guidance for both government and private action, setting standards for cleanup of inactive hazardous waste sites.<sup>20</sup> It incorporates and expands upon the National Contingency Plan, which addresses the cleanup of certain discharges into navigable waters.<sup>21</sup> Nor were guidelines issued for coordination between the state and federal governments for emergency situations, as required by section 106(c).<sup>22</sup> Lacking these nationwide regulations, the program continued with fits and starts through the delayed appointment and early termination of the former Associate Administrator for

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18. See, e.g., *id.* at 788-89 (Oct. 23, 1981). The nomination of Anne Gorsuch as EPA Administrator was confirmed May 5, 1981. See *id.* at 59 (May 8, 1981). On June 12, she announced a major reorganization of the Agency, effective July 1. This action included abolishment of the Office of Enforcement, “policy” enforcement attorneys were assigned to the former Office of General Counsel (renamed Office of Legal and Enforcement Counsel), while other technical enforcement attorneys and technical staff were assigned to the various “program” offices, such as air, water and waste. *Id.* at 243 (June 19, 1981). The EPA General Counsel and Associate General Counsel, Messrs. Percy and Sullivan, were also appointed. *Id.* at 244.

On December 2, Administrator Gorsuch approved a second major reorganization which transferred all attorneys to the Office of Legal and Enforcement Counsel. *Id.* at 974 (Dec. 11, 1981).

On March 26, 1982, EPA General Counsel Perry was promoted to Associate Administrator for Legal and Enforcement Counsel. Mr. Sullivan, the Associate General Counsel who had supervised EPA’s enforcement efforts, was stripped of his authority, *id.* at 1589 (April 2, 1982). (Mr. Sullivan resigned shortly thereafter).

19. See 42 U.S.C. 99,605 (Supp. V 1981).

20. 47 Fed. Reg. 31,202-19 (1982) (to be codified at 40 C.F.R. § 300).

21. See *EDF v. Gorsuch*, No. 81-2083, slip op. at 2 (D.D.C. Feb. 12, 1982).

22. See *id.* section 106(c) states:

Within 180 days after enactment of this Act, the Administrator . . . shall . . . publish guidelines for using the imminent hazard, enforcement and emergency response authorities of this section and other existing statutes administered by the Administrator . . . Such guidelines shall be to the extent practicable consistent with the National Hazardous Substance Response Plan, and shall include, at a minimum, the assignment of responsibility for coordinating response actions with the issuance of administrative orders, enforcement of standards and permits, the gathering of information, and other imminent hazard and emergency powers.

42 U.S.C. § 9606(c) (Supp. V 1981). Guidelines were finally issued in the form of a “policy statement” on May 13, 1982. 47 Fed. Reg. 20,664 (1982).

Hazardous Waste, Rita Lavelle,<sup>23</sup> followed by the resignation of Administrator Ann (Gorsuch) Burford on March 9, 1983.<sup>24</sup>

With the appointment of William Ruckelshaus as Administrator and the installation of a new "team,"<sup>25</sup> the Superfund program has been redefined, and the EPA is, in some ways, coming to grips with its regulatory responsibilities. The Agency has recently taken steps to study cleanup of a number of locations,<sup>26</sup> and has even commenced Superfund-financed cleanup at some sites under section 107.<sup>27</sup> However, section 106 enforcement actions seeking injunctive relief, brought to encourage a voluntary assumption of some liability, continue to play a dominant role in the Administration's hazardous waste policy. In fact, the EPA's general policy of using injunctive relief requiring private cleanup under section 106, in lieu of taking direct governmental action,<sup>28</sup> and then seeking reimbursement under section 107, was recently reiterated.<sup>29</sup> Current policy statements continue to em-

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23. See 12 ENV'T REP. (BNA) (April 9, 1982). LaVelle was forced to resign, in part because of her criticism of EPA's enforcement policy which chooses litigation over viable alternatives for cleanup. N.Y. Times, Feb. 8, 1983, at A1, col. 1. LaVelle is the only EPA official against whom criminal charges have been brought. She was charged with perjury in conjunction with the Congressional investigation of her administration of the Fund. See Chi. Trib., Nov. 17, 1983, at § 1, 36, col. 1. It is becoming clear that her resignation did not end these administrative problems.

24. N.Y. Times, March 10, 1983, at B12, col. 1.

25. N.Y. Times, March 21, 1983, at A1, col. 6. After confirmation by the Senate, Ruckelshaus was sworn in on May 18, 1983. 14 ENV'T REP. (BNA) 91 (May 20, 1983).

26. A well publicized example involves the EPA's study of the complex problem of dioxin contamination. Wash. Post, Dec. 16, 1983, at A1.

27. One example is the Chem-Dyne site in Ohio. United States v. Chem-Dyne Corp., No. C-1-82-840, slip op. (S.D. Ohio, Oct. 11, 1983). The limited extent of this cleanup is discussed *infra* text and notes at notes 150-54.

28. See 13 ENV'T REP. (BNA) 820 (Oct. 15, 1982). The term "government response action" is used herein to indicate those actions known as "response" actions under § 104(a) of CERCLA, 42 U.S.C. § 9604(a) (Supp. V 1981). Section 104(a)(1) authorizes government response:

Whenever (A) any hazardous substance is released or there is a substantial threat of such a release into the environment, or (B) there is a release or substantial threat of release into the environment of any pollutant or contaminant which may present an imminent and substantial danger to the public health or welfare, the President is authorized to act, consistent with the national contingency plan, to remove or arrange for the removal of, and provide for remedial action relating to such hazardous substance, pollutant, or contaminant at any time (including its removal from any contaminated natural resource), or take any other response measure consistent with the national contingency plan which the President deems necessary to protect the public health or welfare or the environment.

42 U.S.C. § 9604(a) (Supp. V 1981).

29. L. M. Thomas & C. M. Price, Guidance Memorandum on Use and Issuance of

phasize the use of "administrative orders" or enforcement actions under section 106, as well as negotiated settlements with parties who are "potentially liable" under section 107, as a means of securing privately funded cleanup.<sup>30</sup>

More recently, the government has sought both injunctive relief and a declaration of liability, blurring the line between section 107 liability and any "liability" which arises under section 106.<sup>31</sup> By spending a relatively small amount of money for investigatory work or emergency measures, the government is able to seek a declaration of liability, as well as further remedial injunctive relief. The result, of course, will be the Agency's continued failure to exercise its full statutory authority to identify hazardous waste sites in need of cleanup and to implement a response strategy.

Notwithstanding the significant question of whether fund-financed cleanup should dominate the EPA program, the manner in which the EPA has circumvented CERCLA by relying on section 106 has raised questions as to how liability and the appropriate remedy should be determined. By asking the courts to use their injunctive powers to mandate costly and complex cleanup action, the EPA has failed to exercise its responsibility under CERCLA to determine appropriate and reasonable remedies before bringing a section 106 action. A liability determination is now sought by the EPA without having performed the necessary investigation according to the standards of the National Oil and Hazardous Waste Contingency Plan, and without having determined the appropriate remedy. Several problems flow from this approach. Cleanup plans should not be made without the thorough scientific investigation which *can* be done by the EPA, but can not be done by the courts. In addition, the financial duress of threatened "joint and several" liability may coerce settlement without proper identification of the environmental problem and an appropriate remedy. Moreover, the management of private companies requires the ability to forecast environmental responsibilities and their financial consequences. Corporate planning requires substantive and consistent actions on the part of the

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Administrative Orders under Section 106(a) of CERCLA (1983) [hereinafter cited as Section 106 Memorandum].

30. *Id.* at 2. EPA, *Cost Recovery Actions under the Comprehensive Environmental Response, Compensation and Liability Act of 1980*, 41 ENV'T REP. (BNA) 11-43 (Oct. 14, 1983) [hereinafter cited as Section 107 Memorandum].

31. *E.g.*, *United States v. Northeastern Pharmaceutical & Chemical Co.*, 80-5066-CV-s-4, slip op. (W.D. Mo. Jan. 31, 1984).

EPA rather than the ad hoc approach that has characterized the Agency's actions under CERCLA to date.

Judicial scrutiny of agency action is of course necessary, but should be limited to oversight of agency implementation of the statute. It is not a substitute for the EPA's assuming its obligation to proceed according to the statute and regulatory guidelines by either cleaning up hazardous waste sites and then seeking cost recovery from liable parties, or properly identifying the environmental hazard and selecting an appropriate remedy before bringing a section 106 action.

It is the opinion of the author that rather than relying primarily on the pursuit of injunctive relief under section 106, the statute contemplates that the Agency assume substantive cleanup responsibility by using the Superfund. At the very least, the EPA should not shirk its statutory authority to investigate a waste site and determine what remedies are necessary before bringing a section 106 action. This is a duty more appropriately performed by the EPA than the courts; nor should the courts circumvent Congress' detailed liability scheme by deviating from the standards of section 107. Courts have only begun to construe the statute, and the scope of its strict liability provision is unclear, although the discussion which follows attempts to provide some definition. Greater judicial involvement is likely in the future, particularly since negotiated settlements will meet with lessening success as parties identified as "potentially responsible" choose to litigate the question of their "responsibility."

In order to understand the effects of the EPA's reliance on its section 106 injunctive authority, this article will first examine the structure of CERCLA as approved by Congress, and how the Act has been implemented by the EPA.<sup>32</sup> Second, the reasons that the EPA adopted its present enforcement strategy will be discussed.<sup>33</sup> Third, the results of this strategy will be examined.<sup>34</sup> This section will focus on the real versus the reported progress made by the EPA; the extent to which the EPA program conflicts with Congressional intent and previous cases which discuss the extent to which the common law can be relied upon to implement statutory environmental programs; the role of the National Oil and Hazardous Substances Contingency Plan in the EPA program;

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32. See *infra* text and notes at notes 36-126.

33. See *infra* text and notes at notes 127-37.

34. See *infra* text and notes at notes 144-206.



and the way in which section 106 liability has been defined by the courts. Finally, the future of the EPA's "voluntary liability" scheme will be discussed.<sup>35</sup>

## II. STRUCTURE AND IMPLEMENTATION OF THE STATUTE

CERCLA was designed to provide the federal government with a variety of regulatory tools to protect the public and the environment from the release of hazardous waste. The Act is unique in that, under section 104 it gives the EPA authority to clean up hazardous waste<sup>36</sup>—termed government "response" action, which is paid for out of the "Superfund"—and then seek cost recovery from liable parties, under section 107.<sup>37</sup> In addition, under section 106, the "imminent hazard, enforcement and emergency response" provision, the government is authorized to secure injunctive relief and "take other action . . . as may be necessary to protect public health and welfare and the environment" from the threat of hazardous waste releases.<sup>38</sup>

In implementing CERCLA, the Reagan Administration has relied on its section 106 authority to bring injunctive actions against potentially liable parties to obtain some degree of clean-up, rather than clean up waste sites itself and then seek cost recovery from liable parties.<sup>39</sup> By bringing injunctive actions under section 106, both the liability standards of section 107, and the cleanup standards contained in CERCLA regulations, such as the National Oil and Hazardous Waste Contingency Plan, are circumvented. While the EPA, under Administrator Ruckleshaus, has indicated that it plans to play a greater role in the formulation of cleanup plans<sup>40</sup>—either by performing cleanup itself, or by getting more involved in the determination of remedies in section 106 actions—its basic approach will likely remain unaffected.

### A. *Introduction to CERCLA: Section 107 Liability*

CERCLA authorizes government cleanup of inactive hazardous waste sites, and establishes a procedure for recoupment of cleanup costs where "liable" parties can be found.<sup>41</sup> If cleanup

35. See *infra* text and notes at notes 207-217.

36. 42 U.S.C. § 9604 (Supp. V 1981).

37. 42 U.S.C. § 9607 (Supp. V 1981); see *infra* text and notes at notes 41-64.

38. 42 U.S.C. 9606(a) (Supp. V 1981); see *infra* text and notes at notes 65-73.

39. See *infra* text and notes at notes 41-73, 78-173.

40. See *supra* text and notes at notes 26-27.

41. See H.R. REP. NO. 1016, 96th Cong., 2d Sess. (1980) 18, reprinted in 1981 U.S. CODE CONG. & AD. NEWS 10,250. See 42 U.S.C. §§ 9604, 9607 (Supp. V 1981).

costs can be recovered from a liable party, under section 107,<sup>42</sup> the monies which are recovered and any other civil penalties are contributed to the "Superfund," which finances government cleanup.<sup>43</sup> The fund is also supported by a tax on certain members of the petroleum and chemical industries.<sup>44</sup>

CERCLA's broad "liability" provision, section 107, imposes liability for cleanup costs and for damage to natural resources on:

- (1) The *owner and operator* of a . . . facility,
- (2) any person who at *the time of disposal owned or operated* any facility . . . ,
- (3) any person who . . . *arranged . . . or arranged with a transporter for disposal or treatment . . . at any facility . . . and,*
- (4) any person who *accepts or accepted* a hazardous substance *for transport* to . . . sites from which there is a release or a threatened release which causes the incurrance of response costs.<sup>45</sup>

Defenses are also specifically enumerated and include establishing that the environmental damage resulted from an act of God, an act of war, or, an act or omission of a third party, who is not an agent or employee and where the defendant exercised due care.<sup>46</sup> These defenses are specific and appear to limit the issues which may be litigated in a section 107 action.<sup>47</sup>

Section 107 liability can be imposed in a number of ways. The statute contemplates, however, that for the most part, a section 107 liability action will be brought against a potentially liable party by whoever cleaned up the waste site.<sup>48</sup> Generally, that party would be the EPA, but an innocent party who cleaned up a waste site could also bring a section 107 action against a potentially liable party for cost recovery.<sup>49</sup>

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42. 42 U.S.C. § 9607 (Supp. V 1981).

43. 42 U.S.C. § 9631(b)(1)(B)-9631(E) (Supp. V 1981).

44. 26 U.S.C. §§ 4611, 4661 (Supp. V 1981).

45. 42 U.S.C. § 9607(a) (Supp. V 1981).

46. See 42 U.S.C. § 9607(b) (Supp. V 1981).

47. An exception would be a cost recovery action by a party who is also potentially liable. *E.g.* City of Philadelphia v. Stepan Chemical, 544 F. Supp. 1135 (E.D. Pa. 1982).

48. This article focuses on liability for government response costs pursuant to 42 U.S.C. § 9607(a)(4)(A) (Supp. V 1981). Standards for liability to "any other person" who incurs "necessary" response costs are set forth at 42 U.S.C. § 9607(a)(4)(b) (Supp. V 1981). Parties may also seek cost recovery through the fund. 42 U.S.C. § 9612 (Supp. V 1981). The government then acquires, by subrogation, the right to proceed against a liable party. 42 U.S.C. § 9612(c) (Supp. V 1981). Recovery may include costs and attorneys fees, without regard to other limitations on liability. 42 U.S.C. § 9612(c)(3) (Supp. V 1981).

49. 42 U.S.C. § 9607(a)(14)(3) (Supp. V 1981).

Section 107 liability was hotly debated by Congress.<sup>50</sup> Senate Bill 1481 would have imposed absolute liability for any release of a hazardous substance except if "federally permitted."<sup>51</sup> The House of Representatives, however, opted for a "hybrid liability" provision which imposed strict liability, but which flatly rejected the Senate's "zero release" approach—imposing liability for a release in any quantity.<sup>52</sup> The Senate agreed to the liability approach of the House bill with one pertinent exception; a definition of "liable" was added, which made it clear that the standard of liability under Superfund was to be identical to the standard of liability under section 311 of the Federal Water Pollution Control Act for spills of oil and hazardous substances.<sup>53</sup>

Section 311 defines statutory liability as the government's "exclusive remedy" for recovery of oil spill cleanup costs,<sup>54</sup> where a "harmful quantity" is discharged.<sup>55</sup> The government is entitled to

50. *E.g.* 126 CONG. REC. S15002-09 (daily ed. Nov. 24, 1980) (statements of Sen. Williams, Sen. Helms, Sen. Jepsen, Sen. Simpson, Sen. Stafford and others).

51. *See* S. 1480, 96th Cong., 1st Sess. § 4(1) (1979); S. REP. NO. 848, 96th Cong., 2d Sess. 46-48 (1980).

52. *See* 126 CONG. REC. H9158 (daily ed. Sept. 19, 1980) (statement of Rep. Madigan). As Congressman Madigan stated, commenting on H.R. 7020, 96th Cong., 2d Sess. (1980):

I am sure that the Members are aware that this session of Congress was inundated by many proposals for 'superfunds,' 'ultrafunds,' and other assorted funds to address various environmental problems. Many of these proposals were extremely broad and attempted to create new concepts of environmental law and toxic tort law. I have been concerned from the beginning that many proponents of this environmental legislation would bog the Congress down by insisting on new "zero release" environmental concepts and punitive and unreasonable liability provisions. The guiding philosophy behind these various legislative proposals was summed up by one of its principal architects at the Department of Justice who said, 'Government is perfectly prepared to punish the innocent for the sins of the guilty.' . . . People in the Senate have made it quite clear that they intend to push the 'zero release' concept. That 'zero release' concept would serve as a regulatory tool against anything that escapes the four walls of a plant.

126 CONG. REC. H9158 (daily ed. Sept. 19, 1980). More recently, Ruckleshaus has expressed a need to define an "acceptable level of cleanup" which "com[es] short of zero risk." 14 ENV'T REP. (BNA) 809 (Sept. 9, 1983).

53. 42 U.S.C. § 9601(32) (Supp. V 1981). The standards of liability under § 311, 33 U.S.C. § 1321 (Supp. V 1981), are contained in § 311(b) and require establishing, "(1) a spill of (2) oil or a substance designated by EPA as 'hazardous,' (3) in a quantity determined by EPA to be harmful." The implementing regulations are found in 40 C.F.R. §§ 116-117 (1982). Whether or not section 107 liability attaches will depend upon whether the release of a "harmful quantity," as defined by regulation under § 311, has occurred. Thus, whether the release is actually harmful is an appropriate issue in such litigation. *See, e.g., United States v. Chem-Dyne Corp.*, No. C-1-82-840, slip op. at 16 (S.D. Ohio Oct. 11, 1983).

54. *United States v. Dixie Carriers, Inc.*, 627 F.2d 736, 738 (5th Cir. 1980) (*Dixie Carriers I*).

55. *United States v. Chevron Oil Co.*, 583 F.2d 1357 (5th Cir. 1978).

recover its cleanup costs from designated parties subject only to certain enumerated defenses.<sup>56</sup> Under section 311, recovery is limited to the amounts authorized by the statute, and cannot be expanded by reference to other statutes or common law.<sup>57</sup> By defining CERCLA liability according to the limited liability standards imposed by section 311, Congress enacted a scheme of strict, but limited, liability under section 107.

Thus, the compromise bill identified section 107 as a strict liability provision, defined by the standard of liability under section 311.<sup>58</sup> Congress explained that under this standard, the government was authorized to clean up sites, and was relieved of the difficult task of proving "fault" in establishing liability for cleanup costs.<sup>59</sup> "Dimensionless" liability, however, was to be prevented by provisions limiting damage claims that may be paid out of the fund.<sup>60</sup>

In addition to the limitations on section 107 liability which arise out of the imposition of the Clean Water Act section 311 standard of strict liability, section 107 itself also limits liability in a number of ways. The scope of CERCLA liability is further limited and

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56. *Matter of Oswego Barge Corp.*, 664 F.2d 327 (2d Cir. 1982).

57. *United States v. Dixie Carriers, Inc.*, 627 F.2d 736 (5th Cir. 1980).

58. Unfortunately, this seemingly clear congressional intent to impose strict liability, as defined by § 311, has not resulted in a clear identification of the circumstances under which liability may be established. While section 311 liability requires the release of a "harmful quantity" to impose liability, at least one court has rejected the use of this standard to determine the release which will trigger CERCLA liability. The district court in *United States v. Wade* noted that the § 311 standard refers to "water pollution," while CERCLA is "directed at the disposal of hazardous waste on land." *United States v. Wade*, No. 79-1426 slip op. (E.D. Pa. Dec. 22, 1983).

59. A Justice Department analysis of existing law concluded that proof of "causation" under existing tort principles precluded common law theories from permitting recovery from "responsible" parties. See DEPT. OF JUSTICE, LAND & NATURAL RESOURCES DIVISION, *THE SUPERFUND CONCEPT. REPORT OF THE INTERAGENCY TASK FORCE ON COMPENSATION FOR RELEASES OF HAZARDOUS SUBSTANCES* 24 (June, 1979). The proof of causation was cited as a principal rationale for the controversial bill (S. 1480) reported by the Senate Committee on Environment and Public Works. See S. REP. NO. 848 10-12, 96th Cong., 2d Sess. (1980).

60. 126 CONG. REG. H9158 (daily ed. Sept. 19, 1980) (statement of Rep. Madigan). Another area of concern was the possible retroactive effect of the liability provisions. Senator Madigan, commenting on H.R. 7020, 96th Cong., 2d Sess. (1980) stated:

Of particular concern to me and a number of my colleagues on the Commerce Committee were the liability issues of this legislation. Especially difficult were the ramifications of retroactive application of statutory liability provisions to past activities of potential defendants. As the committee report succinctly points out, the committee rejected any notion of absolute liability in this regard. While this may be somewhat a hybrid liability provision, it provides fundamental fairness.

126 CONG. REC. H9158 (daily ed. Sept. 19, 1980) (statement of Rep. Madigan).

defined by a requirement that "response" be consistent with the National Contingency Plan; that is, in order for the EPA, or other party that cleaned up a waste site, to recover its costs from a liable party, its cleanup must have been performed in a manner consistent with the guidelines set out in the National Contingency Plan.<sup>61</sup> Therefore, the selection of a proper remedy, and clarification of the statutory language identifying the persons who may be held liable will more precisely determine the scope of CERCLA liability.

In addition, recovery from liable parties is "circumscribed by cost-effectiveness considerations":<sup>62</sup> recovery cannot be obtained from liable parties for cleanup not performed in a cost-effective manner. In certain cases, liability is even limited to specific dollar amounts, provided action is not willful or certain safety standards are not violated.<sup>63</sup> Finally, "federally permitted releases," which include those authorized by other environmental statutes, are exempt from CERCLA liability provisions.<sup>64</sup>

Thus, while giving the EPA the necessary authority to clean up dangerous hazardous waste sites, Congress also established a detailed liability scheme which limits liability in a number of ways. The establishment of this scheme indicates that Congress did not intend to impose limitless liability. Rather, Congress intended to permit cost-recovery only if certain conditions are met, and in any event, liability is limited by the section 311 standard and by section 107 itself. It can be easily inferred that Congress did not intend that the liability scheme it so carefully set out be circumvented.

Congress felt an urgent need for legislation which would allow the EPA to clean up hazardous sites and subsequently recover cleanup costs. Concern about the hazardous waste problem obviously outweighed congressional concern over granting such significant power to the EPA. Nevertheless, to the extent that liability was limited and the EPA's power was circumscribed, those limitations were clearly viewed by Congress as necessary to a fair application of other CERCLA authorities.

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61. 42 U.S.C. § 9607(a)(4)(A), (B) (Supp. V 1981).

62. 126 CONG. REC. H9156 (daily ed. Sept. 19, 1980) (statement of Rep. Staggers).

63. 42 U.S.C. § 9607(c)(1), (c)(2) (Supp. V 1981); *McCastle v. Rollins Environmental Services*, 514 F. Supp. 936 (M.D. La. 1981); *see also United States v. Dixie Carriers*, 696 F.2d 726 (5th Cir. 1980).

64. 42 U.S.C. § 9607(j) (Supp. V 1981).

*B. Emergency Abatement Authority: Section 106*

"The imminent hazard, enforcement and emergency response authorities" of section 106 was designed to give the President the power to respond to an emergency and abate an imminent threat which might otherwise endanger the public.<sup>65</sup> Section 106(a) authority is specifically limited to situations where "there may be an imminent and substantial endangerment to the public health or welfare or the environment because of an actual or threatened release of a hazardous substance from a facility."<sup>66</sup> The President may require the Attorney General of the United States to secure such relief as may be necessary to abate such danger or threat, and the district court of the United States in the district in which the threat occurs shall have jurisdiction to grant such relief as the *public interest and the equities* of the case may require. The President may also, after providing notice to the affected states, take other action under this section including, but not limited to *issuing such orders* as may be necessary to protect public health and welfare and the environment.<sup>67</sup>

Section 106 provides:

When the President determines that there may be an imminent and substantial endangerment to the public health or welfare or the environment because of a hazardous substance from a facility, he may require the Attorney General . . . to secure such relief as may be necessary . . . [and] after notice to the effected State, take other action under this section . . . as may be necessary to protect public health and welfare and the environment.<sup>68</sup>

Guidelines are to be published for exercising this authority, and "emergency response actions" are to be consistent with the National Oil and Hazardous Substance Contingency Plan, to the maximum extent possible.<sup>69</sup> Section 106 apparently does not create new substantive liabilities.

Other substantive bodies of law, including section 107, may direct implementation of the section.<sup>70</sup> In addition, where liability will ultimately arise under section 107, section 106 may operate only to permit the government to minimize that potential liabil-

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65. See 42 U.S.C. § 9706(c) (Supp. V 1981).

66. *Id.*

67. 42 U.S.C. § 9606(a) (Supp. V 1981).

68. *Id.*

69. 42 U.S.C. § 9606(c) (Supp. V 1981).

70. *United States v. Outboard Marine Corp.*, 556 F. Supp. 54 (N.D. Ill. 1982).

ity, by controlling a release where increased harm is threatened. This is evidenced by the title "abatement authority" and by the statute's legislative history—Congress noted that by responding immediately to an emergency, the government could prevent harm from being "exacerbated by delay."<sup>71</sup> Despite the language of section 106 and apparent congressional intent that it provide authority to reduce the threat of harm in emergency situations, the Administration apparently intends to treat it as a liability provision supplementing section 107, as previously noted. On preliminary motions, courts have upheld section 106 claims which couple allegations of imminent and substantial endangerment with requests for injunctive relief, including cleanup of a remedial nature.<sup>72</sup> Except in truly emergency situations, no section 106 claim has been finally decided granting relief of this nature, however.<sup>73</sup>

### *C. Other CERCLA Penalty Provisions*

CERCLA contains other miscellaneous penalty provisions. Section 103(b) details the penalties which may be imposed (as well as limitations on those penalties) for failure to notify the government of a known release.<sup>74</sup> Section 107(c) prescribes civil penalties

71. See S. REP. NO. 848, 96th Cong., 2d Session 28 (1980).

72. *E.g. Outboard Marine*, 556 F. Supp. 54 (N.D. Ill. 1982). Other cases suggest that section 106(a) may be more appropriately used in an emergency context. *United States v. Price*, No. 80-4101, slip op. (D.N.J. July 28, 1983).

73. See *infra* text and notes at notes 178-206.

74. 42 U.S.C. § 9403(b) (Supp. V 1981). This section states that:

Any person

- (1) in charge of a vessel from which a hazardous substance is released, other than a federally permitted release, into or upon the navigable waters of the United States, adjoining shorelines or into or upon the waters of the contiguous zone, or
- (2) in charge of a vessel from which a hazardous substance is released, other than a federally permitted release, which may affect natural resources belonging to, pertaining to or under the exclusive management authority of the United States . . . and who is otherwise subject to the jurisdiction of the United States at the time of the release, or
- (3) in charge of a facility from which a hazardous substance is released, other than a federally permitted release, in a quantity equal to or greater than that determined pursuant to § 102 of this title who fails to notify immediately the appropriate agency of the United States government as soon as he has knowledge of such release shall, upon conviction, be fined not more than \$10,000 or imprisoned for not more than one year, or both.

42 U.S.C. § 9403(b) (Supp. V 1981). Furthermore, § 103(c) provides for similar penalties for failing to notify of the existence of an abandoned or inactive hazardous waste disposal area at which hazardous wastes were stored, treated or disposed. 42 U.S.C. § 9403(c)

for failure to comply with a section 106(a) emergency order.<sup>75</sup> These penalty provisions appear to operate independently of section 107 cleanup liability provisions,<sup>76</sup> although the punitive damage provisions in section 107(c) apply to persons who are "liable for a release" and who violate "an order" under either section 104 or section 106.<sup>77</sup> Only Section 107 prescribes cleanup liability and sets standards and criteria for the liability determination, further supporting the position that a determination of section 107 liability was intended to provide the exclusive remedy for obtaining cleanup by liable parties.

### *D. The National Contingency Plan*

The National Oil and Hazardous Substances Contingency Plan (the Plan), required by CERCLA section 105, establishes procedures, standards, and criteria for both the EPA and private parties for responding to releases of hazardous waste and for cleaning up waste sites.<sup>78</sup> The Plan was published as a regulation by the EPA on July 16, 1982 and has been amended by the addition of the National Priorities List which now identifies more than 400 sites as targets for cleanup.

The Agency published the proposed "National Priorities List" on December 30, 1982, and sites were added on subsequent occasions.<sup>79</sup> The list, which is to determine priorities for Agency response actions under section 106, instead became a blueprint for EPA enforcement action. It was recently published as a final rule in substantially the same form as proposed.<sup>80</sup>

Consistency with the Plan is the standard by which liability for cleanup is determined.<sup>81</sup> Whether it is used to determine "how

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(Supp. V 1981). Compliance with § 103(b) and (c) has been aggravated by the delayed "clarification" by EPA of the duty to report abandoned waste sites under § 103(c) and the lack of any proposed rulemaking to clarify the reporting requirements of § 102.

75. 42 U.S.C. § 9607(c)(3) (Supp. V 1981).

76. 42 U.S.C. § 9607(a) (Supp. V 1981).

77. 42 U.S.C. § 9607(c)(3) (Supp. V 1981).

78. 41 Fed. Reg. 31,180-243 (1982) (to be codified at 40 C.F.R. § 300). The Plan was to have been promulgated by June 9, 1981. The EPA, however, did not act until ordered to do so. *See* EDF v. Gorsuch, No. 81-2083, slip op. (D.D.C. Feb. 12, 1982).

79. 47 Fed. Reg. 58,476-85 (1982). The list proposed 418 target sites. An earlier list of 114 sites was published Oct. 23, 1981. EPA, Statement of Ann M. Gorsuch, Administrator of U.S. Environmental Protection Agency (Oct. 23, 1981). On March 4, 1983, the Times Beach, Missouri dioxin site was added. 48 Fed. Reg. 9311 (1983). Other sites were added in a "first update" to the final list on Sept. 8, 1983. 48 Fed. Reg. 98,674 (1983).

80. 47 Fed. Reg. 31,202-19 (1982) (to be codified at 40 C.F.R. § 300).

81. 42 U.S.C. § 9607(a)(4)(A), (B) (Supp. V 1981).



clean is clean" or to set the standard for cost recovery under section 107, the Plan applies to both government response under section 104, or private party cleanup when reimbursement from the fund will be sought under section 112 or if a liability claim will be asserted.<sup>82</sup>

Subpart F of the Plan requires that the EPA follow a detailed series of steps related to a determination of the:

1. Scope of the problem and extent of release.<sup>83</sup>
2. Steps necessary to mitigate the release.<sup>84</sup>
3. Feasibility of the proposed response and any adverse environmental impact.<sup>85</sup>
4. Detailed design of selected alternatives,<sup>86</sup> and
5. Cost-effective remedy.<sup>87</sup>

Then, cost balancing is performed in order to determine priorities for fund expenditures.<sup>88</sup> Thus, the plan establishes the appropriate response where a release occurs or is threatened.<sup>89</sup> It sets forth a step-by-step approach; each step involves a determination that a particular response is appropriate. An investigation relating to the proposed response is then authorized.<sup>90</sup>

CERCLA prohibits government cleanup where a private party has assumed responsibility. The first "step," therefore, also in-

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82. *See id.*

83. 47 Fed. Reg. 31,216 (1982) (to be codified at 40 C.F.R. § 300.68(d)). The Plan must include:

- (1) methods for discovering and investigating facilities where hazardous substances are located;
- (2) methods for evaluating and remedying releases or threatened releases;
- (3) methods and criteria for determining the appropriate extent of removal;
- (4) government roles and responsibilities;
- (5) provision for assuring availability of response equipment;
- (6) methods of assigning responsibility for reporting releases;
- (7) means of assuring cost-effectiveness of remedial action measures over the period of potential exposure;
- (8) (a) criteria for determining priorities, including a relative risk assessment;  
(b) identification of roles for private response organizations.

84. *Id.* (to be codified at 40 C.F.R. § 300.68(a)).

85. *Id.* at 31,217 (to be codified at 40 C.F.R. § 300.68(h)).

86. *Id.* (to be codified at 40 C.F.R. § 300.68(i)).

87. *Id.* (to be codified at 40 C.F.R. § 300.68(j)).

88. *Id.* (to be codified at 40 C.F.R. § 300.68(k)).

89. The EPA has described this as a three-step process involving: (1) "initial investigation" ("preliminary assessment"), 47 Fed. Reg. 31,214 (1982) (to be codified at 40 C.F.R. § 300.64); (2) "screening" to determine whether "immediate response," *id.* § 300.64(a), or further investigation, *id.* § 300.65, is warranted; and (3) further investigation for nonemergency releases, 47 Fed. Reg. 31,215-16 (to be codified at §§ 300.66, 300.67(d), (e), 300.68(e)-(i)).

90. *See* 42 U.S.C. § 9604(a) (Supp. V 1981).

volves a determination that removal will not be "done properly by the owner or operator . . . or . . . (a) responsible party."<sup>91</sup>

Assuming that no private party has assumed responsibility, the Plan provides that the lead agency,<sup>92</sup> usually the EPA, perform a "preliminary assessment," based on readily available information.<sup>93</sup> The assessment may include consideration of the nature and magnitude of the release as well as whether immediate removal is necessary. The federal response must terminate if there is not a "release" of a "hazardous substance," "pollutant," or "contaminant" from a "vessel or facility" for which government action is authorized.<sup>94</sup>

Next, after reviewing the preliminary assessment, the lead agency determines whether immediate removal is appropriate by examining whether such action "will prevent or mitigate immediate and significant risk of harm to health or to the environment."<sup>95</sup> When the "significant risk" no longer exists and contaminated materials have been disposed of, "immediate removal" is complete.<sup>96</sup> In most instances, immediate removal cannot exceed one million dollars cost or six months duration.<sup>97</sup>

"Planned removal" may follow "immediate removal" when further response, while equipment and resources are on site, would result in substantial cost savings,<sup>98</sup> or, if the public or environment "will be at risk from exposure to hazardous substances."<sup>99</sup> Factors which the agency may consider are similar to those for immediate removal, although planned removal is apparently subject to a lesser "risk" standard.<sup>100</sup> The governor of the affected state must request planned removal, and the state must participate in cost-sharing.<sup>101</sup> The one million dollar/six-month limitation applies,<sup>102</sup> and the action terminates when the risk is abated.<sup>103</sup>

91. 47 Fed. Reg. 31,213 (1982) (to be codified at 40 C.F.R. § 300.61(b)).

92. The "lead agency" provides the "on-scene coordinator" or "responsible official." 47 Fed. Reg. 31,204 (to be codified at 40 C.F.R. § 300.6). Subpart C of the Plan describes the appropriate response "organization." 47 Fed. Reg. 31,207-10 (to be codified at 40 C.F.R. § 300.31-37).

93. Section 106 Memorandum, *supra* note 29, at 11, 16.

94. *See* 47 Fed. Reg. 31,214 (1982) (to be codified at 40 C.F.R. §§ 300.64(a)(1), (2), (4), 300.64(c)).

95. *Id.* (to be codified at 40 C.F.R. § 300.64(a)).

96. 47 Fed. Reg. 31,215 (1982) (to be codified at 40 C.F.R. § 300.65(c)).

97. *Id.* (to be codified at 40 C.F.R. § 300.65(d)); 42 U.S.C. § 9604(c)(1) (Supp. V 1981).

98. 47 Fed. Reg. 31,215 (1982) (to be codified at 40 C.F.R. § 300.67(a)(1)).

99. *Id.* (to be codified at 40 C.F.R. § 300.67(a)(2)).

100. *See* 47 Fed. Reg. 31,216 (1982) (to be codified at 40 C.F.R. § 300.67(c)).

101. *Id.* (to be codified at 40 C.F.R. § 300.67(b)).

102. *Id.* (to be codified at 40 C.F.R. § 300.67(d), (e)).

103. *Id.* (to be codified at 40 C.F.R. § 300.67(c)).

While "planned removal" is not defined in the statute, the Plan indicates that it will provide "short term but not emergency response."<sup>104</sup> As already noted, the EPA has apparently distinguished its emergency power (immediate removal) from planned removal, which has a cost-effectiveness justification. It is not clear, however, that the statute allows the EPA to require state cost-sharing for any short term removal action which costs less than one million dollars.<sup>105</sup> The EPA has indicated that it has "discretion" to do so.<sup>106</sup>

In the final step, the agency determines whether remedial action should be taken.<sup>107</sup> While the Plan addresses both removal and remedial action, "criteria for determining priorities . . . based upon relative risk" and the "list . . . of 'top priority response targets'" relate primarily to the latter.<sup>108</sup> Similarly, under the statute, cost-effectiveness is required only for remedial action.<sup>109</sup> It should be noted, however, that, according to the EPA, an

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104. 47 Fed. Reg. 31,181 (1982).

105. See 42 U.S.C. § 9604(c) (Supp. V 1981). The statute requires state participation with respect to "remedial action." The authority to require participation for planned removal is not clear. See 42 U.S.C. § 9604(c)(3) (Supp. V 1981).

106. 47 Fed. Reg. 31,193 (1982).

107. Remedial action is defined as:

[T]hose actions consistent with permanent remedy taken instead of or in addition to removal actions in the event of a release or threatened release of a hazardous substance into the environment, to prevent or minimize the release of hazardous substances so that they do not migrate to cause substantial danger to present or future public health or welfare or the environment. . . . The term includes the costs of permanent relocation of residents and businesses and community facilities where the President determines that . . . such relocation is more cost-effective than, and environmentally preferable to, the transportation, storage, treatment, destruction, or secure disposition offsite of hazardous substances, or may otherwise be necessary to protect the public health or welfare. The term does not include offsite transport of hazardous substances or the storage, treatment, destruction, or secure disposition offsite of such hazardous substances or contaminated materials unless the President determines that such actions (A) are more cost-effective than other remedial actions, (B) will create new capacity to manage, in compliance with subtitle C of the Solid Waste Disposal Act, hazardous substances in addition to those located at the affected facility, or (C) are necessary to protect public health or welfare or the environment from a present or potential risk which may be created by further exposure to the continued presence of such substances or materials.

42 U.S.C. § 9601(24) (Supp. V 1981).

108. 42 U.S.C. § 9605(8)(A), (B) (Supp. V 1981). For removal actions, the Act requires that these criteria be applied "to the extent practicable." *Id.* § 9605(8)(A). The list of priority sites is discussed *supra*, text and notes at notes 79-80.

109. 42 U.S.C. § 9605(7) (Supp. V 1981).

alternative remedial plan cannot be rejected on the basis of cost alone.<sup>110</sup>

The Plan establishes that remedial action is limited to, "releases on the National Priorities List that are consistent with [a] permanent remedy to prevent or mitigate the migration of a release of hazardous substances into the environment."<sup>111</sup> It is not clear that enforcement action will be limited to listed sites, however, because legal action to force private cleanup may be an alternative to government response and responsibility.<sup>112</sup>

The factors which will determine the appropriate type of remedial action relate generally to the population at risk and the potential for migration of the hazardous substance.<sup>113</sup> A remedial investigation, including sampling and monitoring, is required.<sup>114</sup> Alternatives for controlling the release, including a "no-action" alternative, must then be considered, based upon this information.<sup>115</sup> The alternatives are evaluated by an "initial screening"<sup>116</sup> and then by a more detailed analysis.<sup>117</sup> Factors which are considered include cost,<sup>118</sup> effectiveness,<sup>119</sup> and the engineering feasibility of the design,<sup>120</sup> as well as any adverse environmental consequences of the action.<sup>121</sup>

In the detailed analysis, engineering and cost-effectiveness are again considered.<sup>122</sup> Methods for mitigating adverse impacts and costs are determined,<sup>123</sup> and new data may be gathered, if necessary.<sup>124</sup>

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110. 47 Fed. Reg. 31,185 (1982); *see id.* at 31,217 (to be codified at 40 C.F.R. § 300.68(j)). Under subsection (j), the EPA *must* select the cost-effective alternative, but it must effectively mitigate and minimize the threat to health or the environment.

111. 47 Fed. Reg. 31,216 (to be codified at 40 C.F.R. § 300.68(a)).

112. *See id.* (to be codified at 40 C.F.R. § 300.68(c)). It is notable that cost balancing considerations, which are relevant to the listing process, are not applicable to private cleanup. *Id.*

113. *See id.*, 40 C.F.R. §§ 300.68(e)(1) ("initial" action), 300.68(e)(2) ("source control"), and 300.68(e)(3) ("off-site" action).

114. *Id.* (to be codified at 40 C.F.R. § 300.68(f)).

115. *Id.* (to be codified at 40 C.F.R. § 300.68(g)).

116. *Id.* (to be codified at 40 C.F.R. § 300.68(h)).

117. *Id.* (to be codified at 40 C.F.R. § 300.68(i)).

118. The Plan provides for rejecting alternatives which are no more effective than alternatives which are cheaper by an "order of magnitude." 47 Fed. Reg. 31,217 (to be codified at 40 C.F.R. § 300.68(h)(1)).

119. *Id.* (to be codified at 40 C.F.R. § 300.68(h)(2)).

120. *Id.* (to be codified at 40 C.F.R. § 300.68(h)(3)).

121. *Id.* (to be codified at 40 C.F.R. § 300.68(h)(2)(i)).

122. *Id.* (to be codified at 40 C.F.R. § 300.68(i)(2)(A)-(E)).

123. *Id.* (to be codified at 40 C.F.R. § 300.68(i)(2)(E)).

124. *Id.* (to be codified at 40 C.F.R. § 300.68(i)(3)).

The Plan makes repeated reference to "voluntary" private party action and apparently views any means by which the government can secure private party cleanup, including legal action, to be an "alternative" to government cleanup and subsequent cost recovery under the Act.<sup>125</sup> Thus, within the very document which outlines response procedures, the EPA has carefully guarded its section 106 enforcement tool, paralleling earlier Administration policy.<sup>126</sup> Despite recent EPA statements to the contrary, the EPA will likely continue to exercise this "alternative."

*E. EPA Reliance on "Voluntary" Liability: Reasons and Prognosis.*

1. Factors Contributing to EPA Reliance on Section 106.

The EPA's continued reliance on "voluntary cleanup" to implement Superfund raises a number of questions. Perhaps most significantly, the EPA's early inclination to choose judicial relief in lieu of making the decisions itself as to the appropriate remedy raises a question as to why the EPA would elect litigation where it has the authority to determine appropriate cleanup and then seek a liability determination or indemnification.

In part, a lack of knowledge concerning groundwater contamination posed by abandoned landfills contributes to these attempts to shift responsibility. Determining whether contamination of soil will result in contamination of groundwater is more difficult than predicting threats to surface water.<sup>127</sup> Groundwater flow is far less predictable and understood than are river and lake currents, or wind and weather patterns.<sup>128</sup> Determining the direction, rate, and characteristics of groundwater flow requires an intensive hydrogeological investigation. Those investigations may show

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125. See, e.g., 47 Fed. Reg. 31,216 (to be codified at 40 C.F.R. § 300.68(c)). That section provides that "judicial or administrative action may be an alternative to government cleanup." Another possible objective of judicial action may be to recover anticipated cleanup costs from the liable party *before* government cleanup.

126. See, e.g., Brown, *EPA Pre-litigation Enforcement Strategy in Hazardous Waste Cases*, 14 ENV'T REP. (BNA) 149-152 (May 27, 1983).

127. *E.g.* United States v. Seymour Recycling Corp., 554 F. Supp. 1334, 1340 (S.D. Ind. 1982). The policy which allows partial cleanup has been challenged as possibly allowing responsible parties to escape liability for groundwater contamination. 14 ENV'T REP. (BNA) 1054 (Oct. 21, 1983). See also Mercer, *Groundwater Pollution Control* in GROUND-WATER POLLUTION IN EUROPE 1, 1 (J. Cole ed. 1974).

128. *Id.*

that the geologic strata have effectively confined the pollutants, or removed them from the groundwater by a process known as adsorption or attenuation.<sup>129</sup> In other instances, a contaminated groundwater plume may not threaten a drinking water supply. These difficulties in predicting the extent of groundwater contamination could partly explain the EPA's reluctance to accept the responsibility of taking direct action, and its unwillingness to properly identify environmental hazards and remedial plans.

The Administration's reliance on section 106 to coerce voluntary liability may, in fact, result from a deliberate effort to circumvent the intent of Congress and implement policies of the Justice Department.<sup>130</sup> The Justice Department, concluding that existing statutory and common law forms of relief were inadequate and that an absolute liability provision for any release of a hazardous substance was necessary and appropriate,<sup>131</sup> urged Congress to pass a strict liability hazardous waste bill with a "zero-release" provision. This would have imposed absolute liability for the disposal of any amount of hazardous material.<sup>132</sup> This was rejected, however, first in the House and then on the Senate floor.<sup>133</sup> In its place, a bill which exempts federally permitted releases and, furthermore, adopts the standard of liability under section 311 of the Clean Water Act, was adopted.<sup>134</sup> That provision provides that liability attaches only when a "harmful quantity"—an amount to be determined by EPA regulations—is released.<sup>135</sup> Those regulations establish the "harmful quantities" of various compounds, depending upon the class and relative toxicity of those materials.<sup>136</sup> Thus, the release of one pound of DDT in a twenty-four hour period may be a harmful quantity while a release of 1,000 pounds of xylene or 5,000 pounds of hydrochloric acid in a twenty-four hour period is a harmful quantity.<sup>137</sup>

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129. Smith, *Flow Tracing Using Isotopes*, in *GROUNDWATER POLLUTION IN EUROPE* 377, 377 (J. Cole ed. 1974).

130. See, e.g., DEPT. OF JUSTICE, LAND & NATURAL RESOURCES DIVISION, *THE SUPERFUND CONCEPT. REPORT OF THE INTERAGENCY TASK FORCE ON COMPENSATION FOR RELEASES OF HAZARDOUS SUBSTANCES* (June, 1979).

131. *Id.* at 152.

132. *Id.*

133. See *supra* text and notes at notes 50-60.

134. *Id.*

135. 33 U.S.C. § 1321(f)(1), (b)(3) (Supp. V 1981).

136. 40 C.F.R. § 117.3 (1983). See also 48 Fed. Reg. 23,552-70 (1983) (proposal to adjust reportable quantities under Superfund).

137. 40 C.F.R. § 117.3 (1983).

The use of section 106 by the EPA to obtain injunctive relief, rather than cleaning up and seeking a section 107 liability determination, allows the Department of Justice to enforce zero-release concepts under CERCLA. Because the court relies on equitable principles in determining the relief available to the government, it is not bound to the standards contained in the statute. Under a zero-release standard, the government can establish liability more easily than under the section 311 "harmful quantity" standard. Thus, the Administration's program accommodates the policies urged by the Justice Department, including those not included in the adopted bill.

## 2. "Voluntary Liability" Summary and Prognosis

As discussed above, the EPA has shunned its authority to clean up hazardous waste sites and seek cost-recovery. Instead, it has relied on its section 106 authority to bring injunctive actions against potentially liable parties in an attempt to coerce a "voluntary" assumption of liability, and reach a settlement in which some degree of cleanup responsibility is assumed. If a settlement is not reached, then the EPA would ask the court to construct a remedy.

Despite its apparent about-face in April 1983, announcing an intention to proceed with fund-financed response and cost recovery under its section 107 authority,<sup>138</sup> the EPA's efforts to coerce private party cleanup will probably continue unaffected. The EPA's announced intention to use its section 107 authority to clean up sites and then recover the costs conflicts not only with its often repeated "section 106" policy, but with its own actions as well. It continues to rely on its section 106 authority to obtain private party assumption of liability, and is performing only minimal fund-financed cleanup.<sup>139</sup> In addition to whatever policy reasons the EPA had for choosing this approach, there are a number of significant reasons why fund-financed cleanup would be avoided in the future: EPA cleanup often faces public distrust and hostility;<sup>140</sup> potentially responsible parties have not always "vol-

138. The announcement was made by the Justice Department. 13 ENV'T REP. (BNA) 2344-45 (April 22, 1983).

139. As of May, 1983, only one fund financed cleanup, at a Lehigh Pennsylvania transformer site, was completed. Address by Stephen D. Ramsay, Chief, Land and Natural Resources Division, United States Department of Justice, Superfund Update: Cleanup Lessons Learned, Conference sponsored by Inside EPA Weekly Report and the Center for Energy and Environmental Management (May 17, 1983).

140. Strong opposition to an EPA proposal to clean up PCBs in Waukegan Harbor was

unteered" to pay the cost of cleanup and response action at various sites appears stalemated;<sup>141</sup> the EPA is confronted with the difficulty of designing environmentally effective, cost-effective remedies; finally, to the extent that the EPA identifies a remedy, it must still obtain state assurances that ten percent<sup>142</sup> of the costs will be paid, and that the state will assume long-term operation and maintenance responsibilities.<sup>143</sup> These impediments may be the primary reason the EPA has sought to use the courts to establish private party liability. Thus, the current EPA strategy is likely to continue. The results and effects of this strategy will now be examined.

### III. VOLUNTARY LIABILITY: THE RESULTS

The National Priorities List<sup>144</sup> and accompanying text appear to outline the EPA's accomplishments in the first two years of Superfund implementation. Although at first glance the List indicates significant progress, a look beyond the numbers reveals a less flattering portrait of the EPA's success. Most significantly, the Agency's use of section 106 has begun to face judicial challenge, with very mixed results.

#### A. *The Success of "Voluntary" or Negotiated Settlements*

The preamble to the proposed National Priorities List indicated that in December, 1980, private parties had agreed to perform cleanup at some twenty-five abandoned or inactive hazardous waste sites.<sup>145</sup> Today, cleanup is reported to be underway at more than 180 sites.<sup>146</sup> That number may be misleading, however. The EPA has announced that government response action has commenced at many sites where parallel enforcement action is underway.<sup>147</sup> In most instances, however, "response" has appar-

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presented at an EPA sponsored public meeting (March 14, 1984), and is reflected in an editorial in the local newspaper. "The EPAs latest cleanup idea, a \$20.1 million monstrosity not only would delay the [cleanup] operation but is flawed to the point of flippancy." News Sun, March 20, 1984, at 8A, col. 1.

141. *E.g. id.*

142. The required contribution at state owned sites is 50%. 42 U.S.C. § 960(c)(3) (Supp. V 1981).

143. *Id.*

144. *See supra* text and notes at notes 79-80.

145. 47 Fed. Reg. 58,481 (1982).

146. 48 Fed. Reg. 40,672-75 (1983).

147. *Id.* at 40,661.



ently been limited to investigation and study, without implementation of any remedial action.<sup>148</sup> That number also includes sites where voluntary cleanup (cleanup pursuant to a settlement agreement)<sup>149</sup> may be occurring. Unfortunately, the extent of this reported cleanup may be inadequate at many of these sites.

For example, at the Chem-Dyne site in Hamilton, Ohio, the National Priorities List indicates that a private party response, a government response, and an enforcement action are all taking place.<sup>150</sup> In fact, the voluntary response for this site, which resulted from a settlement agreement with the government, consists of a cash contribution by settling generators toward a fund to abate surface water contamination from the site.<sup>151</sup> These past generators of hazardous waste also agreed to fund a study of the potential groundwater migration.<sup>152</sup> The government's section 106 enforcement action against the non-settling generators is limited to the surface water contamination problem.<sup>153</sup> Both the complaint filed by the government against these companies and the separate settlement agreement purposely avoid the groundwater contamination liability question. While the parties are not released from liability for any groundwater contamination, which may be the subject of a later action, that the EPA failed to include groundwater contamination in its enforcement action demonstrates that EPA action, as indicated by the National Priorities List, may be inadequate.

Chem-Dyne may be typical of the "successful" use of EPA's enforcement strategy. Where there are many generators who are named as defendants, the government promises not to bring suit in exchange for a nominal cash contribution by each generator.<sup>154</sup> The generators thus avoid substantial litigation costs. A company

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148. *E.g. id.* at 40,661; *supra* note 139.

149. For the purpose of tabulating "voluntary" response, the EPA counts only cleanup taken pursuant to a consent order or agreement to which it is a party. *Id.*

150. *Id.* at 40,670.

151. 13 ENV'T REP. (BNA) 597 (Sept. 3, 1982). *See also* United States v. Seymour Recycling Corp., 554 F. Supp. 1334 (S.D. Ind. 1982) (the court approved a settlement agreement providing only for surface cleanup).

152. *Id.*

153. *Id.*

154. For example, a \$10 million cleanup, involving two hundred generators, would require a contribution of \$50 thousand from each. Generator groups have sometimes agreed to apportion the contribution toward settlement on the basis of the volume of waste contributed to a site; the agreements may also reduce the relative share to the extent that a generator's waste is no longer on-site. Address by Barbara A. Hindin, Senior Attorney, ACRO Metals Company, Chicago Bar Association Environmental Law Committee (Nov. 1, 1983).

has an incentive to pay an amount which is less than the cost of defense, thus minimizing costs and avoiding any adverse publicity that may be associated with defending these lawsuits.

Thus, although it may appear that substantial progress is being made in cleaning up sites on the National Priorities List, actual cleanup may be inadequate at many of those sites. By settling with liable parties in a section 106 action, the EPA makes it appear that a site is being cleaned up, while avoiding the rigorous standards imposed by CERCLA and the Plan for taking direct action to respond to releases. This circumvention of Congressional intent will now be examined.

*B. Ad Hoc Decisions on Environmental Standards Conflict with Congressional Policy and Judicial Precedent*

The statute does not contemplate that the government would shirk its responsibility to determine the necessity for cleanup and to select an appropriate remedy. By authorizing cleanup and subsequent cost recovery, it was the clear intent of Congress that the government not resort first to the courts, thus delaying cleanup action.<sup>155</sup> Furthermore, while most of the "standards" for government cleanup under section 107 and the Plan will apply, courts will likely be called upon to interpret and apply those standards and to determine the appropriate extent of remedy on an ad hoc basis. They will be required to determine liability and impose remedies based on considerations which are outside the statute's express provisions.

Recent government efforts to complete preparation of a remedial investigation and feasibility study before seeking out potentially liable parties<sup>156</sup> to implement the scheme are improving on the earlier ad hoc approach. However, courts have already demonstrated an inclination to fashion a new "federal common law" to fill "gaps" in CERCLA, where it is the EPA's failure to fulfill its administrative obligation to design a remedy—not the statute itself—that has left a gap.<sup>157</sup> The Supreme Court rejected such an

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155. At least one government official has argued that litigation to secure private cleanup would not delay cleanup, however. See Memorandum from Jeffrey G. Miller, EPA, to Echardt C. Beck (Dec. 18, 1980) (on file with the EPA and the author). Miller suggested that a pre-cleanup enforcement action would not involve the "difficult issues" of joint and several liability that might be raised in a "recovery action" (a suit to recover fund monies after cleanup). *Id.* at 3. The basis for this conclusion is unclear.

156. 13 ENV'T REP. (BNA) 2344-45 (April 22, 1983).

157. *E.g.* United States v. Wade, No. 79-1426, slip op. (E.D. Pa. 1983).

ad hoc approach to water pollution control in *City of Milwaukee v. Illinois & Michigan (Milwaukee II)*,<sup>158</sup> in which Illinois argued that Milwaukee's discharge of sewage into Lake Michigan not only violated the Clean Water Act, but constituted a federal common law nuisance as well. The Court held that in establishing a comprehensive scheme for establishing water pollution liability, Congress preempted the common law doctrine of nuisance as applied to water pollution control.<sup>159</sup> Other courts have followed the Supreme Court's lead in cases involving hazardous waste control under RCRA.<sup>160</sup> It may be argued that in a similar manner, Congress expressed its will that the courts not resort to common law principles in determining liability for the release of hazardous waste. Rather, the comprehensive liability scheme which it carefully set out in CERCLA section 107 should be followed. Adopting this reasoning, the opinion in *United States v. Outboard Marine Corp.* warns against "recourse to federal common law nuisance" under the guise of section 106(a), and refers to section 107 as the statute's "main liability-creating provision."<sup>161</sup> The Administration's reliance on section 106 to coerce parties into assuming liability, or the imposition of liability without a careful determination of remedy, may, therefore, directly violate CERCLA.

*C. The EPA Has Ignored the Plan By Using the Courts to Establish the Appropriate Degree of Cleanup*

Another important factor in examining the success of the EPA's enforcement program is the role of the National Oil and Hazardous Response Contingency Plan.<sup>162</sup> Enforcement actions which attempt to establish liability without a showing of "consistency" with the Plan or other guidelines required by the Act appear to violate the language of the Act.<sup>163</sup>

Subpart F of the Plan was intended to provide "a detailed

158. 451 U.S. 304 (1981). The Supreme Court has since held that the Federal Water Pollution Control Act, 33 U.S.C. §§ 1251-1376 (1976) (FWPCA) has "entirely preempted" the area of water pollution. *Middlesex City Sewage Auth. v. Sea Clammers*, 453 U.S. 1, 22 (1983).

159. See 453 U.S. at 22 (citing *Milwaukee v. Illinois & Michigan*, 451 U.S. 304 (1981)).

160. *United States v. Price*, 523 F. Supp. 1055 (D.N.J. 1981).

161. *Outboard Marine*, 556 F. Supp. at 56, 57.

162. See *supra* text and notes at notes 78-126. 42 U.S.C. § 9605 (Supp. V 1981).

163. "The plan will be a comprehensive document detailing emergency response and remedial action procedures, including methods of discovery and investigation, methods for evaluating and remedying environmental emergencies and appropriate roles for governmental and private entities. The plan will contain guidance on cost-effectiveness." 126 CONG. REC. S14,965 (daily ed. Nov. 24, 1980) (statement of Sen. Randolph).

systematic procedure" for implementing remedial response and for determining the appropriate extent of remedy.<sup>164</sup> The initial screening is intended to eliminate costly, ineffective, unfeasible or environmentally harmful alternatives from consideration.<sup>165</sup> Then, the available alternatives are analyzed in detail. Emphasis is placed on both effectiveness and cost, including the cost of mitigating any environmental harm caused by the remedy.<sup>166</sup>

The systematic approach called for by the Plan is consistent with that required by other environmental statutes. Under the Clean Water Act, general national standards are required and have been adopted for many industries.<sup>167</sup> Similar industry specific and national regulations are called for, and have been adopted under the Clean Air Act,<sup>168</sup> as well as the Resource Conservation and Recovery Act.<sup>169</sup> Uniform national ambient air quality standards have also been adopted under the Clean Air Act,<sup>170</sup> and the EPA has adopted criteria for minimum requirements of state-adopted water quality standards under the Clean Water Act.<sup>171</sup> Thus, in each of the other principal federal environmental statutes, the Agency has been charged with the responsibility to adopt, and has adopted, appropriate standards to protect the public health. While states are allowed to adopt more stringent standards,<sup>172</sup> *Milwaukee II* makes it clear that common law concepts will not regulate pollutant discharges.<sup>173</sup> Federal and state programs capable of addressing health, economic, and technological concerns now exist to determine the standards which are required.

The criteria to be used in a national contingency plan under CERCLA are not focused upon the site-specific environmental considerations, as are the regulations which have been adopted under the other environmental statutes.<sup>174</sup> To the extent that it

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164. See 47 Fed. Reg. 31,187 (1982); *supra* text and notes at notes 83-124.

165. See *id.* at 31,184.

166. See *id.* at 31,185.

167. See *DuPont v. Train*, 430 U.S. 112 (1977); *American Meat Institute v. EPA*, 526 F.2d 442 (7th Cir. 1975); see also Fort, *The Necessary Demise of Federal Common Law Nuisance*, 12 LOYOLA U.L.J. 131, 147 n.89 (1981).

168. 42 U.S.C. § 7410(a) (Supp. V 1981); e.g. *Portland Cement Ass'n v. Ruckelshaus*, 486 F.2d 375 (D.C. Cir. 1973).

169. 42 U.S.C. § 6921 (Supp. V 1981); 47 Fed. Reg. 32,274 (1982).

170. 42 U.S.C. § 7409 (Supp. V 1981); 40 C.F.R. § 50 (1982).

171. See 33 U.S.C. § 1313(c) (1976); 40 C.F.R. § 130 (1982).

172. E.g. 33 U.S.C. § 1365 (1976).

173. See *supra* text and note at note 58.

174. See *supra* text and notes at notes 83-124.

outlines at least a procedure for determining the appropriate response at any given site, however, that guidance and the relationship of CERCLA to these other environmental schemes is ignored by the EPA's use of section 106(a).

*D. The Imposition of Liability Under Section 106: Judicial Interpretation*

One of the most significant effects of EPA reliance on section 106 has been the circumvention of the comprehensive liability scheme set out by Congress in section 107.<sup>175</sup> Because section 106 actions are brought in equity, courts have not felt bound to the section 107 liability standards.<sup>176</sup> The result has been judicial conflict and confusion over the degree to which the courts can look outside the statute to determine the scope of CERCLA section 106 liability.

The problems which flow from the court's failure to refer to section 107 in mandating private cleanup under section 106—difficulty in business planning, circumvention of Congressional intent, judicial confusion, and the inequity of imposing liability upon individuals and businesses not necessarily liable under section 107—would be alleviated if the courts stayed within the standards carefully established by Congress for determining CERCLA liability. Liability under section 311 of the Clean Water Act has been carefully limited to that “expressly provided” by the statute.<sup>177</sup> Portions of CERCLA which define section 107 liability by reference to Clean Water Act section 311 should be similarly interpreted, and would be rendered meaningless if courts felt free to imply liabilities beyond those expressly set forth in the Act.

Courts have recognized that limitations on section 311 liability are applicable to CERCLA liability,<sup>178</sup> and the liability language of the Act has been strictly construed.<sup>179</sup> Yet, the EPA's persistent efforts to rely on section 106 enforcement has resulted in a more recent judicial trend which expands CERCLA's scope. The second district court in *United States v. Wade (Wade II)* suggests that “federal common law” can define the scope of CERCLA liability.<sup>180</sup> In holding that common law principles of joint and

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175. See *supra* text and notes at notes 41-64.

176. See *infra* text and notes at notes 178-204.

177. *United States v. Dixie Carriers*, 696 F.2d 726 (5th Cir. 1980).

178. *McCastle v. Rollins Environmental Services*, 514 F. Supp. 936 (M.D. La. 1981).

179. *State ex rel. Brown v. Georgeoff*, 562 F. Supp. 1300, 1306 (N.D. Ohio 1983).

180. *United States v. Wade*, No. 79-1426, slip op. (E.D. Pa Dec. 22, 1983).

several liability could be applied in a CERCLA section 106 action, the *Wade II* court opened the door to the imposition of other "federal common law" liability principles in such actions.

On the other hand, the district court in *McCastle v. Rollins*<sup>181</sup> indicated in dicta that "recovery is limited" under CERCLA by the scope of liability expressly provided for in the statute.<sup>182</sup> Relevant to its determination that the complained of "fumes and odors" were not "hazardous substances" under the statute were "limitations" of CERCLA and provisions which preserve "other Federal or State law."<sup>183</sup>

More recently, courts have been asked to determine who may be held liable under the statute, and under what circumstances.<sup>184</sup> As discussed above, many suits seeking recovery of cleanup costs from "liable" parties under section 107 have resulted in settlement agreements which provide for private cleanup or a cash contribution to cleanup costs. These settlements agreements suggest that the parties who may be held strictly liable under the section understand their potential liability, and see few opportunities for successfully litigating the liability question. It is clear to parties in a section 107 action who is liable under that provision to allow for settlement in most cases.

With respect to any liability which may exist under section 106(a), the law is less certain. Since section 106 was not designed as a liability provision, it is unclear from the face of the statute who may be the target of a section 106 action, what the extent of their liability would be, and whether independent liability exists under section 106 at all. For example, in ruling on an earlier motion to dismiss in *United States v. Wade (Wade I)*,<sup>185</sup> the district court refused to find that section 106 supports a cause of action against "past" generators, stating that section 106 is an "emergency" provision.<sup>186</sup> This view, however, is partly contradicted by *United States v. Price*.<sup>187</sup> While the *Price* court held that section

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181. *McCastle v. Rollins Environmental Services*, 514 F. Supp. 936 (M.D. La. 1981).

182. *Id.* at 940. *Rollins* was a class action suit based on state nuisance law. The issue before the court was whether removal was proper. The plaintiff had sued to enjoin the use of a hazardous waste landfill. The defendant removed to federal court, arguing that RCRA issues were raised. The court found RCRA not applicable (because notice requirements were not met), and then considered CERCLA applicability. *Id.* at 939.

183. 514 F. Supp. at 938.

184. *E.g.* *United States v. Seymour Recycling Corp.*, 554 F. Supp. 1334 (S.D. Ind. 1982).

185. *United States v. Wade*, 546 F. Supp. 785 (E.D. Pa. 1982).

186. *Id.* at 794.

187. 523 F. Supp. 1055 (D.N.J. 1981).

106 can be used to sue "past off-site generators of hazardous waste" where "immediate action" is required as a result of an "imminent and substantial endangerment,"<sup>188</sup> it nevertheless ruled that use of section 106(a) was *not* intended to be limited to emergency situations.<sup>189</sup>

On the other hand, the court in *United States v. Reilly Tar & Chemical Corp.*<sup>190</sup> upheld a section 106(a) action against a past off-site generator for remedial cleanup without relying on a finding of an emergency.<sup>191</sup> The complaint sought recovery of response costs already incurred and injunctive relief, alleging the continuing transport of contaminants. The opinion suggests that these conditions present an emergency situation,<sup>192</sup> although the court did not premise its relief on such findings. Because section 107 "liability" was addressed in conjunction with the section 106 cause of action, and the two statutory provisions were not distinguished, however, the opinion provides little guidance on the question of whether independent liability exists under section 106.<sup>193</sup> Furthermore, the court suggested that section 106 could "apply" to persons who do not fall within the strict language of section 107.<sup>194</sup> Thus, a liability determination under section 107 may be irrelevant to a determination of who must obey a section 106 order.

Other language in *Reilly Tar*, however, suggests that CERCLA should not be narrowly construed.<sup>195</sup> Discussing whether *prior*

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188. *Id.* at 1646 (emphasis added).

189. *Id.*

190. 546 F. Supp. 1100 (D. Minn. 1982).

191. *Id.* at 1113. The court rejected an argument that section 106 is "only jurisdictional," drawing analogy to cases under section 7003 of RCRA, 42 U.S.C. § 6973 (Supp. V 1981). 546 F. Supp. at 1113. *See also* Cohen v. EPA, 19 ENV'T REP. (BNA) 1377 (D.D.C. 1983). *Cohen* is a Freedom of Information Act, (5 U.S.C. § 522 (1982)), case involving the EPA's obligation to produce the names of persons who had received CERCLA notice letters, informing them of potential liability and demanding cleanup. The court, in dicta, stated: "Section 106(a) allows EPA the option of filing suit or issuing administrative orders to compel a responsible party to abate hazardous activities . . . [W]ilful violation . . . can result in significant monetary penalties including punitive damages." *Id.* at 1378. *Cohen* suggests that the hazardous activity must be ongoing.

192. *Id.* at 1114.

193. *E.g. id.* at 1111.

194. *Id.* at 1113.

195. The *Reilly* court stated that "CERCLA should be given a broad and liberal construction." *Id.* at 1112. On the other hand, the court stated that section 106(a) "should not become a substitute for other reasonably available response mechanisms." *Id.* at 1114. *See also* State *ex rel.* Brown v. Georgeoff, 562 F. Supp 1300, 1306 (N.D. Ohio 1983). *United States v. Outboard Marine Corp.* suggests that the "broad reading" standard applies to the section 106(a) prerequisite that an imminent and substantial endangerment be

owners of a hazardous waste site could be subject to section 106(a) authority, the court noted that section 106 is "broader in scope" than section 7003 of RCRA and that section 106 contains "no limitations" on the class of persons within its reach.<sup>196</sup> Nevertheless, this discussion of section 106 suggests that it is not a liability provision, and while its "reach" may be unlimited the *liability* determination must derive from another substantive body of law. Thus, section 107, despite contrary language in *Reilly*,<sup>197</sup> may restrict the parties who may be held liable for cleanup under CERCLA to those who fall clearly within the express terms of that section.

The court in *United States v. Outboard Marine Corp.*<sup>198</sup> followed *Reilly Tar*. The United States sought injunctive relief under section 106(a) against Outboard Marine (OMC) as owner of the site. The court appeared to accept OMC's arguments that section 106 is "jurisdictional,"<sup>199</sup> and requires reference to another substantive body of law.<sup>200</sup> However, "while not suggesting that section 107 of CERCLA is the sole substantive basis for section 106(a) actions," it noted that OMC "appears to be within the class of persons liable under section 107."<sup>201</sup> The court also found that the government sufficiently alleged an emergency.<sup>202</sup> The court found that section 106 did *not* "create liability," and would apparently require a separate substantive basis for a section 106(a) action. While section 107 may provide that basis, the court stated:

This court is hesitant to rely only on "the public interest and the equities of the case" in determining the reach of section 106(a). Recourse to the federal common law of nuisance seems to be foreclosed by *Milwaukee II*. On the other hand, Congress included this imminent hazard authority in its CERCLA design, and it should be given effect.<sup>203</sup>

The court then referred to "section 107, the main liability creating

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threatened, while it cautions against an expansion of liability by, for example, recourse to federal common law nuisance. 556 F. Supp. 54, 57 (N.D. Ill. 1982).

196. *United States v. Reilly Tar & Chemical Corp.*, 546 F. Supp. 1100, 1111 (D. Minn. 1982).

197. *E.g. id.* at 1112.

198. 556 F. Supp. 54, 58 n.3 (N.D. Ill. 1983).

199. *Id.* at 55-56.

200. *See id.* at 56.

201. *Id.*

202. *Id.* at 57.

203. *Id.*



provision," in determining "who . . . [was] intended to be liable in an action under 106(a)." <sup>204</sup>

Thus, although cases such as *Wade II* indicate a trend toward expanding CERCLA liability beyond the scope of section 107, many courts are holding that liability determinations in a section 106 action must be made with reference to section 107. These courts are rightly finding that Congress did not intend that the EPA exercise such broad discretion in determining who will be held liable for waste site cleanup that the liability scheme set out by Congress is circumvented. In the first real test of the Agency's discretion with respect to implementation of CERCLA, the District of Columbia District Court adopted this reasoning. In *EDF v. Gorsuch*,<sup>205</sup> the Environmental Defense Fund sued to force promulgation of the National Contingency Plan, required by CERCLA section 105. The court agreed that a plan was required, stating:

Congress has *not* provided the Agency with the type of discretion it evidently desires and contends for in this case. We are bound to effectuate the legislative will. If the EPA desires an element of flexibility in its operations, the Agency must look to Congress and not the Courts.<sup>206</sup>

#### IV. THE FUTURE OF "VOLUNTARY LIABILITY"

With perhaps the exception of *Wade II*, the Superfund cases are consistent with others which look increasingly to the environmental statutes and regulations promulgated thereunder, in making liability determinations. The Supreme Court in *Milwaukee II* rejected the ad hoc approach to environmental decisionmaking that would result from the application of federal common law in the water pollution field. Lower courts have extended the rule to include air pollution<sup>207</sup> and hazardous waste disposal regulation.<sup>208</sup> If CERCLA is allowed to be used as a surrogate for displaced federal common law nuisance, the comprehensive statutory scheme for pollution control will be distorted by the resulting variety of court-fashioned remedies.<sup>209</sup> Industry

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204. *Id.*

205. No. 81-2083, slip op. (D.D.C. Feb. 12, 1982).

206. *EDF v. Gorsuch*, No. 81-2083, slip op. at 6 (citing *Ass'n of American R.Rs. v. Costle*, 562 F.2d 1310, 1320 (D.C. Cir. 1977) (emphasis in original)).

207. *New England Legal Foundation v. Costle*, 475 F. Supp. 425 (D. Conn. 1979), *aff'd in part, rev'd on other grounds*, 632 F.2d 936 (2d Cir. 1980), *aff'd* 666 F.2d 30 (2d Cir. 1981).

208. *United States v. Price*, 523 F. Supp. 1055 (D.N.J. 1981).

209. *United States v. Outboard Marine Corp.*, 556 F. Supp. 54 (N.D. Ill. 1982).

will more likely elect to litigate questions of liability and remedy because an ad hoc approach may greatly increase the stakes of successful litigation.

As demonstrated by the discussion of section 107 "response authority" and section 106 "abatement authority,"<sup>210</sup> the EPA has the responsibility to take action when two events occur. It must identify a release or threatened release of a hazardous substance or pollutant which may present an imminent and substantial threat to public health, welfare or the environment.<sup>211</sup> A second requirement is that the owner, operator, or other responsible party is not itself taking action to respond to that release.<sup>212</sup> To file a lawsuit using section 106, the EPA must also determine that there is a substantial and imminent danger to public health, welfare, and the environment from an actual or threatened release of a hazardous substance.<sup>213</sup> Thus, if the EPA does determine that there is the threat specified by the statute, it has a duty to take responsive action, following the standards and guidelines of the National Contingency Plan.<sup>214</sup> However, while it may file a lawsuit to assist in that response, it is very clear that enforcement authority is not intended to relieve the EPA of its obligation to follow statutory and regulatory guidelines.<sup>215</sup>

The problems inherent in the current EPA approach, which ignores the Plan in the formulation of remedies and circumvents section 107 in the determination of liability, are significant. As discussed above, several problems flow from the current ad hoc approach to determining liability. Judicial conflict and confusion as to the scope of liability makes it difficult for parties to determine whether they can ever be held liable. The circumvention of Congressional intent may unfairly impose liability on parties not covered by the scope of the statute. In addition, a policy which seeks to enforce zero-release concepts, rather than the Clean Water Act section 311 "harmful quantity" standard, appears to contradict one which seeks to maximize the benefits of expenditure of the funds available for cleanup. The Agency's power of coercion is substantial as a result of its ability to enforce a zero-release policy, but the beneficial results of this coercion are not

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210. See *supra* text and notes at notes 41-73.

211. 42 U.S.C. § 9604(a)(1) (Supp. V 1981).

212. *Id.*

213. 42 U.S.C. § 9606(a) (Supp. V 1981).

214. *E.g.* 42 U.S.C. § 9604(c)(4) (Supp. V 1981).

215. See *id.*; 42 U.S.C. § 9606(c) (Supp. V 1981).

evident. Regarding the determination of a remedy, ignoring the comprehensive response scheme which Congress mandated be adopted in the National Oil and Hazardous Substances Contingency Plan may be a direct violation of CERCLA. In addition, it is difficult for potentially liable parties to litigate the question of appropriate remedy when the EPA requests only that a waste site be "cleaned up," without taking the investigatory action laid out in the Plan, or specifying what remedial action should be taken.

The EPA may be moving toward greater reliance on section 107 and the Plan in establishing liability and formulating remedies. To the extent that it is now performing remedial investigation and conducting feasibility studies before bringing a section 106 action, the EPA may be providing a basis for applying the standards of CERCLA and its regulations. The EPA has also indicated that it will now provide a "window" for settlement only at selected stages of the litigation,<sup>216</sup> and that it will not settle for less than eighty percent of cleanup cost, as determined by its feasibility study.<sup>217</sup> While it is perhaps too early to measure the success of this new strategy, it appears that the revised EPA program may be creating more questions than answers, and courts will still be called upon to determine not only who is liable, but the appropriate remedy as well. It is in everyone's interest that one way or another, the EPA take action to inject more certainty, predictability, and consistency into the difficult task of allocating the costs of cleaning up hazardous waste sites.

## V. CONCLUSION

It is clear that the United States will continue to seek privately funded cleanup, and avoid expenditure of money from the Superfund to the maximum extent possible. The National Oil and Hazardous Waste Contingency Plan provides that "voluntary" private cleanup resulting from legal action would serve as an "alternative" to any cleanup responsibility the government might otherwise have. Section 106(a) is the enforcement tool which is likely to be used, and that section apparently authorizes the

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216. 14 ENV'T REP. (BNA) 53 (May 13, 1983).

217. 14 ENV'T REP. (BNA) 979 (Oct. 14, 1983). Earlier announcements would require a settlement offer equal to 100% of estimated costs. The EPA asserted that government cost overruns would result in an even greater cost to parties who did not settle prior to cleanup. 13 ENV'T REP. (BNA) 529 (Aug. 20, 1982).

government to undertake or direct abatement action in emergency situations without a showing of liability under section 107 of the Act, upon a Presidential "determination" of imminent and substantial endangerment. The proposed use of section 106 as an enforcement tool goes beyond its intended emergency application and would convert it into a liability provision. Furthermore, the government has indicated that the standards and criteria of the Plan apply to private cleanup, with the exception of cost balancing considerations.<sup>218</sup> If private cleanup is an "alternative" to government action, it is unlikely that the criteria will be equitably applied. By merely drafting a complaint that combines the strict liability aspects of the statute, the broad language of section 106(a), and an argument that the trier of fact should determine whether there "may be an imminent and substantial endangerment to the public health . . . or the environment" under that section, the United States will be able to argue that the imposition of this heightened liability standard presents an "alternative" to government cleanup.

Unless the court refuses to allow use of section 106 or other "judicial or administrative action" as ammunition in non-emergency situations, any defendant in a cleanup action may anticipate that a CERCLA claim will be presented. An EPA "determination" under section 106(a) could trigger broad implied liability not anticipated by existing law. Therefore, whether the government can now use the Act, particularly whether it can use section 106(a), to effectuate private cleanup, presents an important question because of the potential for long-term uncertainty about liability which may arise if a CERCLA count is included in a complaint, and because the extent of potential liability will be less certain if courts are asked to fashion remedies on a case by case basis.

The Supreme Court in *Milwaukee II* rejected an ad hoc approach to water pollution control.<sup>219</sup> Cases involving RCRA, CERCLA, federal common law nuisance, and other statutory claims, have followed suit. *EDF v. Gorsuch*<sup>220</sup> has made it clear that Congress did not intend that CERCLA be enforced in an ad hoc manner, and that if the Agency would like to have more flexibility under the statute, it must look to Congress, not the courts.<sup>221</sup>

218. 47 FED. REG. 31,217 (July 16, 1982) (to be codified at 40 C.F.R. § 300.68(j)).

219. *Supra* note 92.

220. No. 81-2083, slip op. (D.D.C. Feb. 12, 1982).

221. *Id.* at 6.

Although CERCLA was intended to fill a gap in existing environmental statutes, it should not be interpreted so broadly that it renders the "comprehensive scheme" of other environmental statutes meaningless. Those statutes, to an extent, may have displaced common law nuisance. CERCLA should not be interpreted to reinstate aspects of nuisance law which other statutes have rejected, and CERCLA certainly was not intended by Congress to open up whole new areas of liability beyond those expressly identified in the statute. The courts should find that liability under CERCLA is, in fact, limited to that expressly set forth in the statutory language. It should avoid finding implied liabilities in the language of section 106(a), beyond those intended by the emergency provision and supported by other substantive bodies of law. In addition, the EPA should exercise its full statutory authority to perform the necessary investigation to determine what remedies are necessary, and relate its findings and request for remedies to a potentially liable party at the initial stages of negotiation. By exercising this authority, Congress' statutory scheme will be given effect, and all parties, including the public, should benefit.